

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 15 May 2006**

**BALCA Case No.: 2005-INA-115**  
**ETA Case No.: P2004-NJ-02507501**

*In the Matter of:*

**DOUBLE HAMMER CONSTRUCTION, INC.,**  
*Employer,*

*on behalf of*

**GILMAR BATISTA BARRETO,**  
*Alien.*

Appearance: Cassandre C. Lamarre, Esquire  
Newark, New Jersey  
*For the Employer and the Alien*

Certifying Officer: Dolores DeHaan  
New York, New York

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").<sup>1</sup> We base our decision on the record upon which the CO denied

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<sup>1</sup> This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On January 30, 2002, the Employer, Double Hammer Construction, Inc., filed an application for labor certification to enable the Alien, Gilmar Batista Barreto, to fill the position of Stonemason (AF 64). The job duties for the position, as stated on the application, were:

Operates machinery and uses all tools pertaining to the shaping and installing of stones to build stone structures for commercial and residential development projects. Such as walls, abutments, stairs, fireplaces, sidewalks, barbieque [sic] pits. Spreads mortar over stone and foundations with trowel, and [sic] sets stone in place by hand or with aid of crane. Cleans surfaces or finished work by removing mortar using muriatic acid and brushes. Supervises one stone mason helper.

(AF 64, Item 13). The address where the Alien would work was listed as: "Job sites all over New Jersey" (AF 64, Item 7). The Employer set forth a basic pay rate of \$30.00 per hour and a 40-hour work week from 7:30 a.m. to 4:00 p.m. (AF 64, Items 10-12). The only job requirement was three years of experience in the job offered (AF 64, Item 14). The application was submitted under the Reduction in Recruitment ("RIR") process (AF 68).

On October 13, 2004, the CO issued a Notice of Findings ("NOF"), in which she approved the Employer's request for RIR processing, but proposed to deny certification on the grounds, *inter alia*, that the Employer had not established that the job opportunity meets the definition of "Employment" as set forth in Section 656.3. Specifically, the CO found that the Employer did not document that there is a *bona fide*, permanent, full-time year-round position for an employee other than oneself; nor did the Employer document that the job opportunity has been and is clearly open to any qualified U.S. worker as required by Section 656.20(c)(8) (AF 46-48).

The Employer submitted its rebuttal on or about November 4, 2004 (AF 16-45). However, in the Final Determination, dated December 10, 2004, the CO found the rebuttal

unpersuasive and denied certification on the above-stated grounds (AF 13-15). On December 14, 2004, the Employer requested a review of the denial (AF 1-12). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals (“Board”).

On April 21, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. The foregoing Notice was mailed to various parties, including the Employer, the Employer’s counsel, and the Alien. Although no additional brief or statement of position was filed, the Employer previously set forth the grounds for appeal in the Request for Review (AF 1-2).

### **DISCUSSION**

In the NOF, the CO cited applicable regulations, as set forth above, and stated, in pertinent part:

Employer must document how he can guarantee permanent full-time year-round work performing the duties of a stonemason shown in item 13 of the 7-50A form. Documentation must include the area(s) of construction the firm specializes in, the number of workers he has had in 2001, 2002, 2003 and currently, their names and job duties, whether full or part-time, employee or non-employee. Submit copies of W-2 or 1099-MISC forms, whichever are applicable, for 2001, 2002 and 2003. He must also furnish signed copies of his Federal Income Tax returns for 2001, 2002 and 2003. Documentation in support of full-time year-round employment performing the required duties must include, but is not limited to, copies of contracts, invoices, etc for the performance of those duties for 2001, 2002, 2003 and currently. Since stonemason work is often seasonal, documentation must include the winter months.

(AF 47).

The Employer’s rebuttal consisted of a cover letter, dated November, 2004, signed by “Pedro Barreto Filho, Owner Employer” (AF 16), the Certificate of Incorporation of the Alien’s previous employer, Skyler Inc. (AF 17; *see also* AF 66-67), the W-2 of “Pedro Barreto” for 2002 and 2003 (AF 18, 24), several contract proposals (AF 19-23), a quarterly wage summary for the period ending on 12/31/01 which only referred to one employee (*i.e.*, “Pedro Barreto”) (AF 26), and signed copies of the Employer’s Federal Income Tax returns for 2001, 2002, and 2003, in which most of the relevant information was redacted and marked “CONFIDENTIAL” (AF 27-44).

In the Final Determination, the CO denied certification, stating in pertinent part:

We have reviewed employer's rebuttal of November 4, 2004 and its enclosures. The rebuttal does not include the areas of construction the firm specializes in, the number of workers he has had in 2001, 2002, 2003 and currently, their names and job duties, whether full-time or part-time, employee or non-employee, as requested in the NOF. The employer has furnished W-2 forms for 2002 and 2003, but only for Pedro Barreto, the alien.<sup>2</sup> Signed copies of employer's Federal Income Tax returns for 2001, 2002 and 2003 have been submitted; however, all financial data covering items such as Income, Deductions, Tax and Payments and Cost of Goods Sold, have been removed as "Confidential." We note that all three Tax Returns describe company's business as "Construction – Carpentry." With reference to the contracts, invoices, etc. requested in the NOF, the employer has submitted four (4) Proposals, three of which were accepted on June 12, September 7 and September 21, all in 2004. The fourth proposal, which was also accepted, does not include the date of acceptance. No documentation was submitted for 2001, 2002, and 2003, although requested in the NOF. These documents do not satisfactorily establish that the employer can guarantee permanent full-time year round employment as a stonemason.

(AF 14). We agree.

The requirement of a bona fide job opportunity arises out of section 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. and Alireza Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate) (the job must truly exist and not merely exist on paper). The employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker." *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*) (adopting *Pasadena Typewriter*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en*

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<sup>2</sup> In the request for review, signed by "Pedro Barretos oFilho," the Employer stated that the CO erred in stating that the W-2s were those of the Alien. To the contrary, the Employer stated: "I supplied my W-2, and I am not the alien as stated by Mr. [sic] DeHaan." (AF 1-2). However, we find that this misconception does not change the result of this appeal. Although not the basis for our decision, we observe inconsistencies in the surname of the Employer's Owner. On the one hand, the application (AF 64-65), rebuttal cover letter (AF 16), and request for review (AF 1-2), indicate that his surname is "Filho" or "oFilho." However, in the request for review, Mr. Filho states that the W-2s are actually his own (AF 1-2), and they list his surname as "Barreto" (AF 18, 24), which is identical to the surname of the Alien.

*banc*).

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Moreover, the Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer in the instant case failed to provide documentation specifically requested by the CO relevant to the issue of whether the position offered is *bona fide*, full-time, permanent employment, we find that labor certification was properly denied.<sup>3</sup>

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges

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<sup>3</sup> With the request for review, the Employer's Owner belatedly submitted some additional information (AF 3-4). However, it is well settled that evidence submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Moreover, the Employer still did not provide any contracts, invoices, or proposals for 2001, 2002, and 2003, nor copies of unedited tax returns. Finally, on the basis of the stated basic pay rate of \$30.00 per hour for 40 hours (AF 64), a *full-time* stonemason would have an annual income of \$62,400. Yet, the only W-2 forms provided by the Employer, reveal that "Pedro Barreto" (*i.e.*, Employer's owner) received wages of \$31,200 in 2002 and 2003, respectively (AF 18, 24; *see also* AF 1-2).

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Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.